THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor. } ST. LOUIS, THURSDAY, FEBRUARY 26, 1874. { SUBSCRIPTION: $8 PER ANNUM, in Advance.
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The Louisville and Portland Canal Injunction Case.

We publish in this number the full text of the opinion of Mr. Justice MILLER in the case of the United States v. The Louisville & Portland Canal Company, in the United States circuit court for the district of Kentucky. Although the immediate question arose out of a very special state of facts, local in their character, yet the principles by which it was determined are general, and the manner in which they were applied to the complicated nature of the relations of the canal company to its creditors, to the general government and to the public at large, is both highly interesting and instructive. What can be clearer than the analysis there given of the complex character of the canal corporation under its two-fold legislative history, and the nature of its trust duties? The thoughtful reader will not fail to observe the high view that is taken of the legal rights of the creditors of the corporation, and to note that the learned justice unhesitatingly asserts that their rights cannot be impaired, *even by congress.*

Does an Action for Breach of Promise die with the Defendant?

It will be remembered that about two years ago Mary Francis Wade instituted an action against Martin Kalbfleisch, ex-mayor of Brooklyn, to recover $100,000 for alleged breach of promise of marriage. The ex-mayor was a wealthy widower, somewhat advanced in years, and the "expectations" of Miss Wade were no doubt great. She is said to have been a lady of great beauty and accomplishments; and if this be true, and she could have brought her action to a favorable verdict during the life of the ex-Mayor, no doubt the damages awarded her would have been heavy. This would be inferred, not only from the great wealth of the defendant, but also from a consideration of the very eligible offers of marriage she must have lost, through being the recipient of his attentions. But, unfortunately for her, before the case came to a trial, the defendant died; and she thereupon sought to have the action continued against his estate. But Judge NELSON, of the supreme court of New York, sitting at special term, decided that this could not be done. This decision has now been affirmed in general term; and it is said the question will go to the court of appeals.

Internal Revenue Law—Effect of Supplementary Assessments.

In the United States circuit court for the southern district of New York, on the 14th instant, a decision was rendered by Judge SHIPMAN, upon the question of the power of an internal revenue assessor to make supplementary assessments, and the effect of such assessments as evidence of the liability of the tax-payer. The New York Herald states the case substantially as follows:

The action was brought to recover $3,773. This amount of money was paid under protest to the defendant, who had been collector of the sixth district. Under the act of July 20, 1868, the plaintiff took out a license as a distiller, and in the months of October, November and December, 1868, and February, 1869, he presented to the assessor the returns as required by law. On these returns an assessment was made and sent to the collector, and the plaintiff paid the amount of the assessment. In July, 1869, the assessor, following the instructions of the commissioner of internal revenue, made a re-assessment for the months already specified. This re-assessment increased the first assessment to the sum of $3,773. This amount, as above mentioned, was paid under protest. The case came on for trial in the United States circuit court, before Judge NATHANIEL SHIPMAN; Mr. Goodlett, United States district attorney, appearing for the government, and Mr. Thomas Harlan for the plaintiff. On the trial it was conceded that the returns made by the plaintiff were correct, and that the assessment proceeded upon the supposition—a belief of the commissioner of internal revenue—that the original assessment, as made upon the returns, was erroneous in consequence of a mistake made by the collector. The collector gave proof of the assessment, but did not offer any testimony as tending to show wherein the imputed error in the original assessment consisted. Two questions have arisen on these facts. (1.) When the tax-payer has made a correct return, and the assessor has made an erroneous assessment thereon, which assessment has been paid, has the assessor, under the law, power to make a supplementary assessment? (2.) Is the re-assessment presumed to be correct without affirmative proof on the part of the government that there was an error in the original assessment?

The decision of Judge SHIPMAN decides the first point in the affirmative, provided that the assessor makes the supplementary assessment within the time (fifteen months) stated in the ninth section of the act of July 13, 1866. He answers the second question in the negative.

Contracts by Banks for Interest in Excess of Charter Rates Void—Accommodation Paper—Usury.

Our readers will thank us for laying before them at this early day the opinion of the Supreme Court, in Tiffany v. Boatmen's Savings Institution, published in another column, substantially affirming the views of the circuit court in the same case (1 Dillon C. C. R. 141). It *decides* several questions of great interest and moment, and, notwithstanding the marked judicial caution of the learned justice by whom it was prepared, it *indicates*, perhaps, with some degree of certainty, the views or inclination of the court upon some other question not directly in the path of its judgment.

The opinion is important, because it adheres to the case of the United States v. Owens, 2 Pet. 557, and declares that it must be "accepted as the doctrine" of the court, where the charter of a bank prohibits it from taking greater than a specified rate of interest, and is silent as to the penalty if more than the charter rate be taken, that the effect is to render the whole rate void, and not simply the excess beyond the legal rate. Since the case of the United States v. Owens was decided, the same question has frequently arisen, and the courts elsewhere have generally, but not uniformly, held that the contract was avoided only as to the *excess* (see cases cited,

1 Dillon C. C. R. 149); but the Supreme Court hold, affirming the judgment of the circuit court on the point, that if the contract be executed and the money paid, neither the borrower, nor his assignee in bankruptcy, can recover anything but the *excess* beyond the legal rate of interest.

As to the other main point in the case, as presented to the Supreme Court, though not raised below, the court hold that where negotiable paper, which is, in fact, accommodation paper, is purchased with knowledge of its origin, and with reason to believe that it was not created in the regular course of business, it is open to the defence of usury. What would be the rule if the purchase was made in good faith, without such knowledge, is not decided; but the reader will notice with interest the observations of Mr. Justice DAVIS, in respect to Nichols v. Fearson, 7. Pet. 103, and "the general current of decisions" upon the subject.

It was made a point in the court below, that the remedy to recover the excess of interest beyond the legal rate was exclusively at law. The circuit court decided that equity would entertain a bill for this purpose, and the point does not seem to have been questioned in the Supreme Court.

Conflict between Federal and State Court for Possession of Property of Insolvent.

Some time since a petition was filed in the United States district court for the southern district of New York, praying that the Glenham Manufacturing Company be declared bankrupt. On this petition Judge BLATCHFORD adjudicated the company bankrupt, and appointed a trustee. It appeared that the marshal, acting under the warrant of the court, took possession of the property of the company; but it was claimed that before he did so, actual possession of it had been obtained by a receiver, who had been appointed in certain proceedings in the state court. The marshal claimed that he held the property by virtue of the warrant issued from the United States district court, but he had been called upon, under an order of the state court, to show cause why he kept possession of the property or be punished for contempt. The case is said to be an important one, involving over a million dollars. Most of the property consists of real estate.

Mr. J. H. Choate, who appeared on behalf of the petitioning creditors, said that the property was now in the custody of the marshal, and he asked that it be delivered to the trustee. With regard to protection or indemnity to the marshal, the court had the whole of the property; it was in the keeping of the marshal; and three-fourths of the creditors had united in a deed to the trustee. Mr. J. C. Carter, who appeared for the marshal, said that the possession was obtained by the marshal without force: it was silently and quietly yielded to him under the authority of receiver; and the question was, was that such an acquiescence as would preclude the state court from again resuming its authority over the estate?

Judge BLATCHFORD is reported to have said that the principle was well settled that the court never issued its warrant to the marshal to take possession of property out of the hands of a receiver of a state court. He had always held that property in the hands of a receiver of a state court could not be disturbed at all. When the marshal took property out of the hands of a receiver of a state court he must give it up; he would no more sanction a marshal taking such property than he would sanction a receiver of a state court taking property out of the hands of the marshal. If the receiver had this property in his hands at the time the marshal took it, the marshal had no business to touch it, and ought to give it back.

Mr. Choate read an affidavit, which contained a statement to the effect that the receiver voluntarily allowed the marshal to take possession at Glenham. Mr. J. C. Carter said the warrant did not tell the marshal what property to take. Judge BLATCHFORD: If the marshal took this property away from the receiver he must give it back; as to indemnity to the marshal, the trustee cannot give it. Some further discussion having ensued, the court denied the motion, with leave to Mr. Choate to renew it again, when the question as to what indemnity should be given to the marshal (in case he has to surrender the property to the receiver) will be taken into consideration.

Indiana Divorces—The "Seventh Clause"—Incurable Insanity no Ground of Divorce.

Indiana has been proverbial for easy divorces. Many an unhappy husband or wife has resorted thither to procure a release from the matrimonial obligations which the laws of no other state would accord them. The peculiar feature of the Indiana divorce act which has given that state such an eminence, is known as the "Seventh Clause." The statute, (2 Gavin & Hord, 351,) after enumerating six separate grounds of divorce, provides (clause 7) that divorces may be granted for "any other cause for which the court shall deem it proper that a divorce shall be granted."

The supreme court of that state seem to have shown a proper disposition to check the unlimited discretion thus conferred, by declaring, as they did in Ritter v. Ritter, 5 Blackf. 81, and in Rubey v. Rubey, 29 Ind. 174, that an appeal lies from a decree granting a divorce under the discretionary clause of the statute. They said, in effect, that it was a legal discretion, which must be reasonably and not arbitrarily exercised, and that its exercise was subject to review in the appellate tribunal. DEWEY, J., in Ritter v. Ritter (*supra*) said: "That power, ample as it is, is not entirely without limits. The statute requires a *cause* of divorce, on which the discretion of the court is to be exercised. The conclusion of the judgment that such cause is reasonable, and such a one as forfeits the marriage contract on the part of the wrong doer, or otherwise, is not an act of legislation. * * * Like all discretionary power in courts, it must be exercised in a sound and legal manner; it must not be governed by caprice, or prejudice, or wild and visionary notions with regard to the marriage institution, but must be so directed as to conduce to domestic harmony, and the peace and morality of society."

In the recent case of Curry v. Curry, determined in the general term of the superior court of Indianapolis, and which will be found in the reports of that court, vol. 1, p. 236, it was held that hopeless and incurable insanity on the part of the wife, unaccompanied by any misconduct on her part, was no ground of divorce under the "seventh clause." The petition alleged "that during the year 1857 said Sarah lost her reasoning faculties, and became insane; that plaintiff immediately and promptly resorted to the use and procurement of every and all means and remedies known to the most eminent physicians of the age and country, for the purpose of

restoring the mind and health of said Sarah, but without success; that since that time to the present he has continued his efforts for her restoration, and has had her placed under treatment at the Indiana Hospital for the Insane, where she has been kept and treated for about half the time; that the balance of the time she has been kept and cared for in the family of said plaintiff; all of which has occasioned him great expense, and which efforts and medical treatment have availed nothing towards the restoring of said Sarah; that she has been pronounced incurable, and is hopelessly insane; that by reason of her misfortune she has become troublesome, disagreeable and repulsive to her own children, having lost every attribute of humanity; that plaintiff has been impoverished, and himself and his family made utterly and indescribably miserable, by reason of the continued insanity of said defendant; that her presence in the family, and the knowledge of his relations to her, make his life almost a burden, and that his and her children desire that he may be divorced from said Sarah."

NEWCOMB, J., said: "It is not charged that the malady of the wife resulted from any *misconduct* on her part, or that she did any act in violation of her marital duties while sane. She, therefore, has committed no wrong against her husband. The statute places a limitation upon the power of courts in divorce cases, which, in our judgment, is fatal to the present suit. There is no authority conferred to grant a divorce except "upon the application of the *injured party*." Where no wrong has been committed by one party to the marriage contract, it is impossible that there can be, in a legal sense, an injured party. Where no wrong has been done by the party against whom the divorce is sought, a divorce cannot be granted. (Gullett v. Gullett, 25 Ind. 517. It is a great and irreparable injury to a husband for his wife to lose her reason, but he is not an injured party within the meaning of the statute, because the sufferer is not a wrong doer. The injury may be classed among those other accidents or calamities, that are in law deemed the acts of God, for the consequences of which no legal right of action accrues. *Actus Dei nemini facit injuriam.* We hold, therefore, that the state of Indiana has not conferred authority upon her courts to decree a divorce to a husband on the sole ground that the wife has become hopelessly insane; at least, when such insanity has not been superinduced by a vicious or reckless cause of conduct on her part."

Federal Court Practice—Power of a Justice of the Supreme Court to sit in a Circuit to which he is not assigned—The Louisville & Portland Canal Company: The Rights therein of the Bondholders, the Government, and the general Public declared.

THE UNITED STATES v. THE LOUISVILLE & PORTLAND CANAL COMPANY.

United States Circuit Court, District of Kentucky.

Before Mr. Justice MILLER.

1. **Federal Court Practice—Power of Supreme Court Justice to sit out of his circuit.**—Where the judge of the district court for a district where a bill in equity is brought, and the circuit judge for the circuit, and the judge of the supreme court allotted to that circuit are all absent from the district and circuit, another justice of the supreme court has jurisdiction at any place in the United States to hear an application for an injunction, notwithstanding the act of congress of June 1, 1872.

2. **The Louisville & Portland Canal.**—The legislative history of the Louisville & Portland Canal Company when first incorporated by Kentucky, in 1825, down to the present, and its relation to the government of the United States, given by Mr. Justice MILLER, who holds that the corporation is still in existence and has the right to use and control the canal and its revenues so far as may be necessary for the purposes contemplated by the act of the legislature of Kentucky and the joint resolution of the two houses of congress of May 24, 1860.

3. ——. **Rights of Bondholders, Government and Public.**—The United States is the only stockholder in the company, and its directors are naked trustees without an interest; and under the state and federal legislation concerning the canal and the bonds issued to raise money to enlarge and improve it, secured by a mortgage of the revenues and tolls of the canal company, there are three parties interested in the trust and the manner in which its duties shall be discharged by the company: 1st. The bondholders of the company. 2d. The government of the United States, sole stockholder, and which has expended $1,000,000 upon the canal; and 3d, the general public.

4. ——. **Act of June 10, 1872—Power of Congress—Vested Rights of Bondholders.**—The appropriation act of congress of June 10, 1872, in relation to the canal, construed so as not to impair the rights of the bondholders, and the opinion expressed that congress could not abolish or so limit the tolls as to injuriously affect them, "for the plain reason that it would be a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation."

5. ——. **Prosecution of the Work by Government Officers.**—Under the circumstances of the case the president and directors of the canal company were enjoined, at the suit of the United States, from interfering with its engineer, officers and contractors in the prosecution of the work of repairing and improving the canal.

The facts appear in the opinion.

Mr. Justice MILLER:—Upon a bill in chancery directed to the judges of the circuit court of the United States for the district of Kentucky, an application is made to me at Long Branch, in the state of New Jersey, to enjoin the Louisville & Portland Canal Co. from interfering with the engineer officers of the United States, and the person with whom they have contracted for the work of making certain repairs and improvements in said canal, under authority of an act of congress appropriating money for that purpose, approved June 10, 1872. An affidavit of the attorneys of the United States accompanies the application, which shows that the judge of the district court for that district, the judge of the circuit court of that circuit, and the judge of the supreme court allotted to that circuit are all absent from and without the district and circuit. I am of opinion, therefore, that notwithstanding the provisions of the similar section of the act to further the administration of justice, approved June 1, 1872, I have jurisdiction to hear the motion, and that it is my duty to do so.

The language of the act under which the agents of the government are proceeding is important. It is found in the act "making appropriations for the repair, preservation and completion of certain public works on rivers and harbors and for other purposes," and is *verbatim* as follows: "For the continuing the work on the canal at the Falls of the Ohio river, three hundred thousand dollars. And the secretary of war is hereby directed to report to congress, at its next session, or sooner if practicable, the condition of said canal, and the provisions necessary to relieve the same from encumbrance, with a view to such legislation as will render the same free to commerce at the earliest practicable period, subject only to such tolls as may be necessary for the superintendence and repair thereof, which shall not, after the passage of this act, exceed five cents per ton."

A brief reference to the history of this canal, and its relation to the government of the United States, is essential to an understanding of the matter now presented for consideration.

By an act of the Kentucky legislature of January 12, 1825, a corporation was chartered by the name of the Louisville & Portland Canal company, to construct a canal around the falls of the Ohio river, with a capital stock of six hundred thousand dollars divided into shares of one hundred dollars each, with the right to levy tolls on vessels passing through the canal. By subsequent statutes the capital was increased to ten thousand shares, and the United States, under acts of congress, became the owner of twenty-nine hundred and ten of said shares. The canal was constructed and has ever since been in successful and profitable operation; and the tolls collected under the limit of the charter granted by the state yielded such a revenue beyond what was necessary to

keep the canal in repair, that by the joint legislation of the state and the United States, and by the consent of the individual corporators, a plan was adopted and entered upon to make the canal free to the uses of commerce, except so far as might be necessary to keep it in repair. This plan was inaugurated by an act of the Kentucky legislature, passed in 1842, the provisions of which were accepted by the stockholders, including the United States. Its essential features were, that the surplus revenues of the corporation should be used to buy up all the stock held by others than the United States, and that when this should be accomplished, the canal should be transferred to the control of the government for the use of the public, subject only to such tolls as might be necessary for its superintendence and repair. This plan was so far carried out that in the year 1855 all the shares other than those held by the United States had been purchased in, except five shares left purposely in the hands of as many individuals to qualify them to hold office as directors of the corporation.

But while this process of extinguishing the individual shares had been going on, it became clear that the demands of commerce required an enlargement of the canal and a change in its place of lower outlet, which could only be made by an additional or branch canal. The successful use of the tolls in buying in the shares of private stockholders, pointed at once to the means of making this increase in the capacity of the canal without burdening either the state or federal government; and by statute of the Kentucky legislature of 1857, and joint resolution of the two houses of congress of 1860, the canal company was authorized to do this work and to borrow money for that purpose, and pledge the faith of the company and its tolls or revenues on the money so borrowed. The corporation accordingly issued its bonds for one million six hundred thousand dollars, secured by a mortgage on the canal, its franchises, and its tolls and revenues; and proceeded to expend the sum realized on these bonds, in the enlargement and improvement of the canal. It was proved, however, that when this money was all expended, the canal was still unfinished; and the congress of the United States in the year 1868 commenced a series of appropriations for the purpose of completing the work, which has been continued to the present time. Over nine hundred thousand dollars have thus been appropriated and expended under the control and direction of the officers of the government, and the appropriation of 1872, already referred to, was in continuation of this work.

During this time the president and directors of Portland Canal company and the officers of the United States seem to have acted in harmony, the corporation collecting the tolls, and paying for and superintending the temporary repairs. They have also paid the interest on the debt, and redeemed or bought in about half a million in amount of the bonds. This harmony would probably have continued, but for the clause in the present act of appropriation, that "after the passage of this act the tolls should not exceed five cents per ton." It is the first time that congress has attempted to regulate or limit the tolls to be collected on vessels using the canal. The rate thus limited would not produce enough to make the ordinary and necessary repairs, and pay for the superintendence of the canal. It would leave the interest on the bonds unpaid, and largely impair if not destroy the security of the bondholders for the payment of the principal.

The president and directors of the company construe the act as appropriating the money on the *condition* that the tolls shall be limited to five cents per ton, and they say that an acceptance of the appropriation would be an implied consent to this limitation. They, therefore, notified the officer in charge that they refused to accept the appropriation.

That officer, however, proceeded to let the work and commence operations, and the corporation interfered by physical force to prevent it, and I am now asked by the bill before me, filed in behalf of the United States, to enjoin the corporation from this interference.

The officers of the canal company maintain: 1st. That the corporation is the legal owner of the canal, and that neither the government of the United States nor any one else has the right to assume such control of its property, as the action of the engineer officers seeks to do, without the consent of the directors of the company; and 2d. That a due regard to their duty to the bondholders and other creditors of the corporation forbids them from giving either express consent, or such consent as inaction would imply, to the assumption of the United States, to reduce the tolls found in the appropriation act.

The United States, by its counsel, on the other hand, maintain that since the year 1855 the corporation has had no existence as such, or if it has any existence, it is merely a nominal one, as the agent of the government for whose sole use it is kept alive; and that as the government owns practically all the stock, it has, and should have, the right to control the use, and direct the changes and improvements in the canal. This view is supposed to receive additional force from the powers and duties of the national government in regard to the navigable waters of the United States.

The first, and perhaps the most important question, to be determined is the relation of the corporation and its officers to the possession and control of the canal.

The proposition of the government counsel is based upon the idea that when, under the act of 1842, all the private stock had been bought, the government became, without other action, the owner, and entitled to the possession and control of the canal; and that both by operation of that statute and the necessity of the case, the corporation ceased to have an existence, or at least to have any right or title to the canal; and this argument is made stronger, in the opinion of counsel, by the circumstance that at that time, to-wit, on the 31st day of January, 1855, by a report to the secretary of the treasury, the directors advised him of the purchase of private stock, and the readiness of the corporation to transfer the custody of the canal to the United States so soon as the department was prepared to receive it. But it does not appear that the department was ready to receive the transfer. Certainly no formal act either of congress or of the department, accepting this transfer or acknowledging the obligation on which alone it was to be so transferred, namely, to hold it for the use of the public free of tolls except so much as might be necessary for its superintendence and repair, is shown or claimed. On the contrary, in reply to the notification of the company, the secretary requested them to continue their organization by retaining a share of stock for each director to maintain his eligibility as such, and to manage the affairs of the canal as heretofore.

But whatever doubt may exist as to the precise relations of these officers to the work at that time, is removed by the subsequent act of 1857, of the state legislature, and the joint resolution of congress of 1860. These have already been referred to as authorizing the company to extend and enlarge the canal, and to contract a debt for that purpose; but as the language of the joint resolution of congress, approved May 24, 1860, seems to me to be conclusive of the continued existence of the corporation, I will give its precise terms. It was resolved, "That the president and directors of the Louisville and Portland Canal company be, and they are hereby, authorized, with the revenues and credits of the company, to enlarge the said canal, and to construct a branch canal from a suitable point on the south side of the present canal, to a point in the Ohio river opposite Sand Island, sufficient to pass the largest class of vessels navigating the Ohio river." The resolution had two provisos, one protecting the United States from liability for the debt so incurred, and the other declaring that when the work was completed, *and paid for*, no more tolls should afterwards be collected than was necessary to keep it in repair and pay for its superintendence and management.

This resolution, beyond all controversy, clearly recognizes three facts of important bearing on the matter in hand: 1st. The existence of the corporation called the Louisville & Portland Canal Compahy; 2d. That it had revenues and credits which might be sufficient to enable it to raise means for this large and expensive work; 3d. That it had the right, or it was then given so far as the United States could give it, to use these credits and revenues for that purpose.

It is inconceivable that this company had any other revenue than the tolls from the canal, or any other credit than that which arose from the right to these tolls, and the ownership or control of the canal. To me it seems that this is conclusive of existence of the corporation and of its right to use and control the canal and its revenues *so far as was necessary for the purpose contemplated by the act of the Kentucky legislature and the joint resolution of the two houses of congress.*

But while these considerations prove the continued existence of the corporation, the validity of the contract by which they pledged the canal and its revenues for the money borrowed for its extension, and its duty to secure and protect this revenue and to do all that lawfully may be done to prevent its destruction, or diversion from that purpose, it is still true that the directors of this corporation occupy a very peculiar position, and one widely different from the directors of railroads, insurance companies and other corporations for private gain. The United States is the only stockholder of this corporation. The directors have really no personal interest in the corporation or its property. They are to all purposes what equity calls trustees without an interest, the depositaries of a naked trust. For whom do they hold this trust, and for whose benefit must they exercise it? This enquiry, though lying at the foundation of the question to be solved here, is fortunately not a difficult one. There are three parties interested deeply in this trust and in the manner in which its duties shall be discharged, which I review in the order of the superiority of their claims rather than their importance.

1st. The holders of the bonds, secured by the mortgage, authorized and placed under a two-fold legislative sanction by the legislature of Kentucky and the congress of the United States. 2d. The United States, the holder of all the stock in the corporation, expending a million of dollars beside for the benefit of the canal; and, 3d. The public, the community, to whose use, free of all charges but those necessary to keep it in operation, it has been solemnly dedicated by the legislature of Kentucky, by the congress of the United States, and by the action of the corporation itself, as well as by all the acts of all these parties from 1842 to the present time, so soon as the enlargement is completed and the debt thereby created discharged.

As regards the first of these, I have no hesitation in expressing my entire conviction that the bondholders have a lien upon the revenues of the canal and a right to insist that the corporation shall protect these revenues, to the extent necessary to make entirely safe the payment of their debt and its accruing interest; and that until that debt is paid, or the mortgage satisfied or otherwise discharged with the consent of these bondholders, this right of theirs remains, with the corresponding duty of the directors of the corporation. But the right of these creditors is limited to this, and so long as their security is unimpaired it is the duty of directors to advance the other interests I have mentioned, for which they are trustees. The interests of the United States and of the public are, for present purposes, identical. The government has, in all its actions, shown its desire and its intent, that at the earliest moment the public use of the canal should be freed from all burdens save those necessary for its repair and management, and her very act which has given rise to the present opposition of the president and directors is wholly in the interest of the public, and designed to hasten the end long contemplated by all parties.

Now, if the act of the United States in completing the enlargement of the canal is an act for the benefit of all these parties, the bondholders inclusive, the resistance of the president and directors is an act in detriment of their trust, injurious to all the interests confided to them, and a mere arbitrary exercise of power which should be restrained. If, on the other hand, any one of those interests would be seriously prejudiced, they should not be disturbed in the exercise of a reasonable discretion in the protection of that interest.

That the work itself which is being done by the government is a useful and a necessary work for the public good, and for that of the United States, as a stockholder and as the representative of the public, is undeniable. That it also adds to the value of the security of the bondholder, and is to that extent in his interest, is equally clear.

But in regard to the latter, if, as alleged by defendant, the work is being constructed in a manner which so far obstructs the use of the canal as will endanger the revenue from which this interest is to be paid, or if, as the trustees seem to believe, the work when completed under the present act of congress, will extinguish the right of the corporation to collect sufficient toll to pay both principal and interest of their debt, then the work should not be done, for these rights are paramount.

In regard to the manner of doing the work, the affidavits submitted satisfy me that no such serious obstruction to the use of the canal, or to the repairs which the directors wish to make, will result from the work as that claimed by the defendant; none which should be set up for a moment in comparison with the great value to all parties of the vigorous prosecution and early completion of the work of extension and enlargement.

But I am satisfied that the president and directors are honest in their belief that an acquiescence on their part in the expenditure of this appropriation on the canal, would bind them legally as an acknowledgment of the government limitation of the toll—an acknowledgment which would be a violation of their official duty. Of this result they will be rid if their action is controlled by a competent court against their protest. To refrain from disturbing the contractors and engineers in expending this money, when their hands are tied by an injunction, raises no presumption of acquiescence in the claim of the government to reduce the toll to a minimum.

Should the court so restrain? or, if they are right in their construction of the statute, should they be permitted to resist congressional interference in this matter?

This leads me to a remark or two on the construction of the appropriation act. The first sentence is a distinct and clear appropriation of $300,000 for the continuance of the work in which the government had for several years been engaged, and in which it had spent, aside from its stock, near a million of dollars. The subsequent sentence directs the secretary of war to report to congress what legislation is necessary to relieve the canal of encumbrance, so that it may be free from all other toll than what is required for its management and repair; and this sentence declares that such toll after the passage of this act shall not exceed five cents per ton.

That the appropriation is absolute and independent of the clause concerning toll, I have no doubt. It might as well be argued that it was dependent on the report of the secretary of war. Whether, therefore, the toll be reduced or not, the appropriation remains and should be carried into effect.

When we consider that the next sentence recognizes the encumbrance on the canal, no doubt meaning the one in favor of the bondholders, so often mentioned in this opinion, and directs an enquiry as to what action by congress is necessary to remove it, I can hardly believe that in the same sentence it was intended to destroy the essential thing on which that encumbrance rested, namely, the tolls. The argument is, therefore, not without force, that congress meant, when they said such tolls should not exceed

five cents per ton after the *passage of this act*—such act as they contemplated in future to pass—to satisfy or remove that encumbrance.

It must be confessed that the language is not apt for this construction; that in their caution, the directors might well have supposed that congress intended to limit the tolls at once to five cents per ton.

If this construction of the statute be correct, then I have no hesitation in saying that that part of it which so limits the tolls is void, for the plain reason that it is a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation.

I think I have shown that the prosecution of this work is for the benefit and advantage of all concerned; that it does not seriously interfere with the ordinary use of the canal, and that the accomplishment of the work will neither confer on congress the right to regulate the toll, nor validate the attempt already made to do so, if congress really intended to make such an attempt.

Under these circumstances I have no hesitation in controlling the president and directors of the canal company in the exercise of the great trust committed to them, so far as may be necessary to permit this work to go on, and in exercising this control, I feel satisfied that I am relieving them from an embarrassment and responsibility which they will gladly rest on the shoulders of the court. The injunction will be granted.

ORDERED ACCORDINGLY.

NOTE.—A noticeable feature in the foregoing opinion is the favorable light in which it regards the rights of the bondholders of the corporation: the learned justice declaring with emphasis that even *congress* could not limit the tolls of the canal pledged for their benefit so as to impair their rights. In England parliament would possess this power, as shown by the case of Brown v. Mayor, etc., of London, 9 Com. B. (N. S.) 726, 1861. There a statute discharged the liability of the city of London on bonds payable out of tolls and duties levied on vessels navigating the Thames; and it was held that no action would thereafter lie against the corporation thereon, on the principle that where the performance of an obligation has been rendered impossible by act of the law, the obligation is discharged. See, also, St. Louis v. Shields, 52 Mo. 351; Dillon on Munic. Corp. Sec. 41 *et seq.* (2d ed.), note.

As to the right of the United States to bring an injunction bill in the proper circuit court to protect improvements which she is making under the authority of congress, in navigable waters, from injury which will be caused by acts done by state authority, see United States v. Duluth (city of), 1 Dillon C. C. R. 469; sequel to same case, 2 Ib. 406.

Contracts by Banks for Interest in Excess of Charter Rates—Accommodation Paper—Usury.

JOHN K. TIFFANY, SURVIVING TRUSTEE OF JOHN F. DARBY, BANKRUPT, APPELLANT, v. THE BOATMEN'S SAVING INSTITUTION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

Supreme Court of the United States, No. 179; October Term, 1873.

1. **Usury—Missouri Statutes**—Whether the usury statutet of Missouri apply to banking corporations therein, *quære*.

2. ——— **Bank Loans—Charter Rate of Interest**—On the principle that a contract to do an act forbidden by law is void, if a bank in making a loan exceeds the charter rate, it cannot recover on the note, although the statute does not declare the note void, and is silent as to the effect of taking more than the prescribed rate of interest: following U. S. v. Owens, 2 Pet. 575.

3. ———. ——— ———. **Where Contract is executed.**—But this principle does not apply to cases where the contract is *executed* and the money has been paid; in such case the borrower, or his assignee in bankruptcy, can only recover back the excess beyond the charter rate.

4. ———. ———. ———. **Accommodation Paper**—The same principle applied to purchases of accommodation paper with knowledge or good grounds of knowledge of its character, and that it was being sold for the benefit of the maker.

5. ———. **Bona fide Holders.**—Whether a *bona fide* purchaser of accommodation paper without knowledge of its origin, and that it was not created in the regular course of business, is affected by usury statutes, discussed and cases cited and course of decision referred to by Mr. Justice DAVIS.

The facts of the case appear in the opinion. A full report of the cause in the court below is given in 1 Dillon C. C. R. 141. The defendant appealed to the Supreme Court.

Mr. Knox for the complainant; *Mr. Gantt* for the defendant.

Mr. Justice DAVIS delivered the opinion of the court.

This is a bill in equity, seeking to recover from the defendant certain large sums of money which, it is alleged, were loaned to Darby at usurious rates of interest, in violation and fraud of the bankrupt act. The bill does not ask for a decree for the excess of interest reserved over the legal rates, but proceeds for the recovery of all the money loaned to Darby and repaid by him, on the theory that the contracts between the parties were illegal and void, and that this illegality affected all the notes, and that if equity will not enable Darby to recover back what he voluntarily paid, it will his representative, on the ground that the rights of the trustee are greater than those of the bankrupt. There are two transactions which are sought to be impeached. The first relates to a loan of $135,000, at the rate of ten per cent., made on the 4th day of October, 1868, on the security of certain jail bonds of the city of St. Louis. The other is predicated on the purchase by the defendant, at usurious rates, of certain notes given by Darby, and endorsed for his accommodation.

The circuit court did not consider, under the evidence, the last transaction unlawful, and decided that the complainant could only recover the amount of interest paid upon the note of $135,000 in excess of 8 per cent. per annum.

This decision, and the exclusion of certain evidence offered by the complainant, are the errors which are the object of this appeal. The general statute of Missouri concerning usury (chapter 89 of General Statutes of Missouri, 1865, p. 401) allows an individual to receive 10 per cent. per annum interest for the loan of money; but, if more be taken and suit is brought to enforce the contract, and the plea of usury be interposed, the whole interest is forfeited to the proper county for the use of schools. The debtor is not released from his obligation to pay, but the interest is diverted from the parties and appropriated for school purposes. If, however, the borrower suffers judgment to go against him without pleading usury, or if, without suit, he pays the usurious interest, he cannot, either at law or in equity, maintain an action for its repayment. This was settled in Ransom v. Hays (39 Mo. 448), and reaffirmed in Rutherford v. Williams (42 Mo. 35); and these decisions would be conclusive of this controversy, unless it is affected by the bankrupt law, if the legislature intended the general provisions of the interest act to apply to loans by artificial as well as natural persons, although the former might be restricted to a less rate of interest than the latter. It is contended by the defendant that this act was meant to apply to corporations, and that if a bank, discounting a note in the course of business, commit usury, it is subject to precisely the same consequences with an individual. On the other hand, the complainant insists that the legislature did not intend in this matter to place corporations on the same footing with natural persons, and cites in support of this position The Bank of Louisville v. Young (37 Mo. 406). But the facts of that case did not involve the construction of a contract made by a corporation created by an act of the legislature of Missouri. The point decided there was, that a note given to secure a loan made in foreign bank notes by a foreign corporation, doing business by an agent in St. Louis, contrary to the provisions of an act to prevent illegal banking, was void.

We have been cited to no case in the courts of Missouri, nor are we aware of any, in which the question has been directly presented whether the general law relating to usury applies to, and has the same effect upon, a contract made in violation of its charter by a bank as upon a contract made by an individual. The question is one of great importance to the business interests of that

state, and may be far-reaching in its consequences, and as it is not necessary to decide it in order to dispose of this case in accordance with the principle on which the circuit court placed its decree, we prefer to leave its decision to the state tribunals. Assuming, then, that this defendant is not within the purview of the general usury statute of the state, what are the consequences that must attach to it for taking excessive interest from Darby? The bill proceeds on the idea that the provision of the charter being violated, all the loans to Darby were *ultra vires* and void, and as they were made to him within four and six months of his adjudication as a bankrupt, with the knowledge of the defendant during the whole course of its dealing with him that he was insolvent, the complainant has, in his character of trustee, the right to recover for the use of his trust all the sums of money paid to defendant by Darby, because paid in fraud of the bankrupt act.

The defendant is, by its charter, authorized to lend money on interest, but is forbidden to exact more than eight per cent. for the loan. No penalty is prescribed for transgressing the law, nor does the charter declare what effect shall be given to the usurious contract. This effect must, therefore, be determined by the general rules of law. The modern decisions in this country are not uniform on the question whether, if the bank takes more than the rate prescribed, the contract shall be avoided or not on these general rules; nor is this a matter of surprise, if we consider the growing inclination to construe statutes against usury so as not to destroy the contract. It is, however, unnecessary to review these cases, or the earlier ones in England and this country, which uniformly hold that the contract is avoided; because this court has, in the case of the Bank of the United States v. Owens, reported in 2 Peters, decided the question.

The bank in that case brought suit upon a promissory note that was discounted at a higher rate of interest than six per cent., which was the limit allowed by its charter upon its loans or discounts. The charter, like that of the Boatmen's Institution, did not declare void any contract transcending the permitted limits, nor affix any penalty for the violation of the law. It was contended in that case, as it has been in this, that a mere prohibition to take more than a given per cent does not avoid a contract reserving a greater rate, and that when a contract is avoided, it is always in consequence of an express provision of law to that effect. But the court held otherwise, and decided that such contracts are void in law upon general principles; "that there can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is illegal." Chief Justice TANEY, in the Maryland circuit, as late as 1854, in a similar case, held similar views, and supported them by the decision in this case. (Dill v. Ellicott, Taney's Circuit Court Decisions, p. 233.) It must, therefore, be accepted as the doctrine of this court, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice.

But it does not follow in cases of usury, if the contract be executed, that a court of chancery, on application of the debtor, will assist him to recover back both principle and interest. To do this would be to aid one party to an illegal transaction, and to deny redress to the other. Courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money loaned, with legal interest; nor, if the contract be executed, will they enable him to recover any more than the excess he has paid over the legal interest. (Story's Eq. Jur., 1 vol., 10th edition, by Redfield, sections 300, 301, 302.) In recognition of this doctrine the court below rendered a decree for the excess of interest over eight per cent. per annum exacted of Darby on the note for $135,000, and dismissed the bill as to all other claims. The six accommodation notes, which defendant claims to have been purchased from note brokers, were really taken on loans to Darby, and the illegal interest received above eight per cent. on them should, on the principle of that decree, be refunded, as much as that upon the larger note. It is true that usury is only predicable of an actual loan of money, and equally true that a negotiable promissory note, if a real transaction between the parties to it, can be sold in the market like any other commodity. The real test of the salability of such paper is whether the payee could sue the maker upon it when due. He could do this if it was a valid contract when made, otherwise not. Mere accommodation paper can have no effective or legal existence until it is transferred to a *bona fide* holder. It follows, then, that the discounting by a bank at a higher rate of interest than the law allows of paper of this character, made and given to the holder for the purpose of raising money upon it, and its origin only a nominal contract, on which no action could be maintained by any of the parties to it if it had not been discounted, is usurious, and not defensible as a purchase. The point was decided in New York at an early day (15 Johnson. 55), and this decision recognized and approved by this court in Nichols v. Fearson, 7 Peters, 103, and the general current of decision is in the same direction. (Munn v. Commission Co., 15 Johns. 55; Powell v. Waters, 17 Johns. 176; Wheaton v. Hibbard, 20 Johns. 289; Powell v. Waters, 8 Cowan, 669; Corcoran & Riggs v. Powers, 6 Ohio State, 37; 3 Parsons on Contracts, 6th edition, p. 144, and cases cited in note *s*.)

There are cases which hold that the purchaser of such paper is protected if he took it in good faith of the holder, without knowledge of its origin, and in the belief that it was created in the regular course of business. (3 Parsons on Contracts, p. 145, and cases cited in the note on that page.) Whether this limitation of the rule be correct or not, it is not important to enquire, as the decision of the question under consideration does not rest upon it.

The six notes which are the basis of the transaction complained of, were executed by Darby, solely for the purpose of raising money upon them, endorsed by Brotherton & Knox, for his accommodation, and delivered by him to Stagg and other street brokers, to be negotiated. This negotiation was effected with the Boatmen's Institution, and it is perfectly manifest that the cashier, in purchasing the paper, did not suppose that he was advancing the money for the benefit of the brokers who held them, or of Brotherton & Knox, who endorsed them. They were doubtless purchased because the security was deemed sufficient, but it is impossible to conceive that the cashier did not know the paper to be of that class called accommodation, as it is conceded that Brotherton & Knox were gentlemen of large pecuniary ability, and had no occasion to go upon the street to get paper held by them *bona fide*, against Darby or any one else, discounted. Indeed, Stagg says the notes were negotiated for Darby's benefit, and explains, in some instances, how it was done. Darby would apply to him for money on his paper, and he would go to the Boatmen's Bank to see if the cashier would take it, and if the reply was in the affirmative, the paper would be made, taken to the bank, and the money obtained on it. Can any rational person suppose, in the absence of any direct evidence, that the cashier in dealing with Stagg thought he was dealing with the owner of the notes? The presumption is that street brokers act for others, not themselves, and that the cashier was well acquainted with this course of business. If so, he knew, or ought to have known, that Darby wanted the money, and that the paper was made to enable him to get it, and for no other purpose.

This being the case, the transaction can be viewed in no other light than as a loan of money directly to Darby, and as he paid more than 8 per cent. for its use, the circuit court erred in not ordering the excess to be refunded.

The remaining question to be considered is, whether, in this case, the rights of the trustee are greater than those of Darby.

[Upon this point the court held that the assignee could claim

nothing which Darby could not have claimed had he been a party to the suit. If Darby were suing, he could only recover the excessive interest paid to the bank]

The opinion closes as follows:

The case will have to go back for the purpose of enabling the circuit court to ascertain, in some proper way, the excess of interest over the charter rate paid on the six accommodation notes, and to enlarge the decree so as to recover that sum. In all other respects the disposition of this case by the circuit court was correct.

Injunction to Restrain Issue of Bonds by Public Corporations.

UNION PACIFIC RAILROAD COMPANY v. LINCOLN COUNTY.

Circuit Court of the United States, District of Nebraska, November Term, 1873.

Before DILLON and DUNDY, JJ.

1. **Public Corporations—Bonds—Injunction**—Upon proper application the issue of negotiable bonds by a public corporation will be enjoined, when the statute authorizing their issue only upon certain terms has not been complied with in matters of substance.

2. **Statute authorizing must be followed.** An act of the legislature of Nebraska in respect to the issue of such bonds construed, and it is held, where the statute required such bonds to be paid in *ten* years, that a vote authorizing bonds to run *twenty* years was such a material departure from the statute that the court would enjoin the issue of the bonds.

This is a bill by the Union Pacific Railroad Company, as a large property owner and tax-payer in the county of Lincoln, in behalf of itself and other tax-payers similarly situated, to restrain the proposed issue of $30,000 of the bonds of the county, to borrow money to aid it in erecting public buildings therein. The county commissioners ordered an election to be held at the different voting precincts in the county, on the 25th day of May, 1872, to vote on the proposition to issue $30,000 in the bonds of the county to bear ten per cent. interest and maturing in twenty years, and also to levy annually a tax sufficient to pay the interest of said bonds and the principal at maturity, for the purpose of building a court house and jail. The proposition carried, and the bill is brought to restrain the issue of the bonds. The bonds proposed to be issued are negotiable in form, with interest coupons attached, for $500 each, payable August 1st, 1892, or at the option of the county, at any time after 1880. Each bond contains a recital that it is authorized by sections 19 and 26, and section 28 of chapter 9, of the Revised Statutes of the State, in pursuance of the vote of the 25th day of May, 1873.

O. P. Mason, T. F. Gantt, for the county; *A. J. Poppleton, E. Wakely* and *John D. Howe*, for the plaintiff.

DILLON, Circuit Judge:—Upon consideration, we hold:

I. That the act of the legislature of the state of Nebraska, of February 15, 1869, and the amendatory act of March 3, 1870, which authorize "any county or city to issue bonds to aid in the construction of any railroad, or other work of internal improvement," have no application to the issue of bonds by a county for the erection of public buildings therein; and, therefore, the legality of the proposed issue of bonds by the county in the case at bar can derive no support from these enactments.

II. That the only authority for the issue of such bonds in this state is that which is recited in the bonds here proposed to be issued, viz: Sections 19 to 28 of chapter 9 of the revised statutes of the state.

III. Section 19 gives the county commissioners "power to submit to the people of the county, at any regular or special election, the question whether the county will borrow money to aid in the construction of public buildings." The mode of submitting is prescribed in section 21, and section 22 provides as follows "When the question submitted involves the borrowing of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes, and no vote adopting the question proposed shall be valid unless it likewise adopts the amount of tax to be levied to meet the liability incurred." "Sec. 23. The rate of tax levied shall in no case exceed three mills on the dollar on the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, the rate shall be such as to pay the debt in ten years."

It is our judgment that the legislative intention here is to require the debt created to borrow money to erect public buildings to be paid in ten years, and the requirement expressly is that a rate of tax shall be voted and levied sufficient to pay the debt within that period. This provision is defeated if the county may vote to create a debt payable in twenty years, and to levy an annual tax during that period, and such was the proposition which was, in this instance, submitted to, and adopted by, the voters. If the tax is raised in ten years sufficient to pay the debt, the debt ought to be such an one as that the tax may be applied to its payment, for the tax is "specially appropriated and constituted a fund distinct from all others" for this purpose. A construction of this legislation is not admissible by which money to pay the debt may be raised years before the debt itself is payable.

As this is decisive against the right of the county commissioners to submit, or the people to adopt, the proposition for the issue of bonds to run twenty years, it is not necessary to notice the other grounds for the injunction presented in the bill. It may be that if these bonds were issued and in the hands of *bona fide* holders for value, they could be enforced against the county; but the issue of such bonds will be enjoined upon proper application, when the statute in matters of substance has not been complied with. An order will be entered denying the motion to dissolve the injunction heretofore allowed, and continuing it in force.

DUNDY, J., concurs. ORDERED ACCORDINGLY.

NOTE.—In the case of the same plaintiff, at the same term to restrain Merrick county from issuing railway aid bonds, under the act of February 15, 1869, the court, on demurrer to the bill, held, under section 21 of the revised statutes of 1866, even where the notice of the question submitted to the voters of the county was published in a newspaper, that it was essential to the validity of the vote that "a copy of the question submitted should be posted up at the places of voting." In this case, it was alleged that the notice was not thus posted at the place of voting, in a town, the vote in which controlled the result in favor of the proposition.

Federal Court Practice—Mode of Entitling Bills and Affidavits—Service of Copies.

CHARLES V. STERRICK v. JAMES W. PUGSLEY ET AL.

United States Circuit Court, Eastern District of Michigan, January 26, 1874.

Before LONGYEAR, District Judge.

1. **The Address of a Bill** to the "circuit court, etc., in chancery sitting," is sufficient

2. **Entitling Bill in the Cause.**—A bill ought not to be entitled in the cause, because when it is filed there is no cause pending; but such an entitling may be rejected as surplusage.

3. **Affidavits Venue, how Stated.**—In affidavits taken before a United States circuit court commissioner, the venue should be stated thus: "United States o America, District of ——," and not "State of ——, County of."

4. **Entitling Affidavits.**—Affidavits made to be used in a suit not yet commenced should not be entitled as of any court or cause; and such an entitling is good cause for their rejection.

5. **Service of copies of Affidavits.**—The proper practice in regard to the service of copies of affidavits on the opposing counsel stated.

United States circuit court, eastern district of Michigan. In equity. Charles W. Sterrick v. James W. Pugsley and Arthur D. Smith. Opinion delivered January 26th, 1874. On the motion

of complainant for a preliminary injunction to restrain defendants from using a deed of assignment of a patent by complainant to defendant Pugsley, and from claiming or exercising any rights thereunder.

Mr. Breese, for complainant; *Mr. H. H. Brown*, for defendants.

LONGYEAR, J.—Some preliminary objections will be first noticed. The defendants' counsel objected to the bill of complaint being read on the grounds:

1. That the entitling of the court is not "in equity," but of the "circuit court," etc., merely.

2. That it is entitled in the cause.

The address of the bill is to the "circuit court," etc., "in chancery sitting." This is sufficient, and if the entitling of the court were of any consequence the court would direct it to be amended by adding the words "in equity."

The bill is entitled in the cause. This is irregular, because until the bill is filed there is no cause pending. The bill, however, is complete without it, and the entitling as to the parties is rejected as surplusage.

The objections to the bill are, therefore, overruled.

Counsel for defendants also objected to the reception and reading of the affidavits annexed to the bill of complaint in support of the motion for injunction on the grounds:

1. That they have no proper venue.

2. That they are not entitled in any cause "in equity."

The affidavits are sworn to before United States circuit court commissioners, some of them before a commissioner for the eastern district, and some before a commissioner for the western district of Michigan. The venue of each is, "State of Michigan, County of Calhoun," or, "County of Kalamazoo," according, I suppose, to the county in which the oath happened to be administered. This was irregular. The proper venue of an affidavit taken before a United States commissioner is "United States of America, District of ——," naming the district and state for which the commissioner is such. In this case it should have been "Eastern District of Michigan," or "Western District of Michigan," as the case was. In the view taken by the court, however, upon the merits of the motion, admitting all the affidavits, it is unnecessary for the purposes of this case to decide what is the effect of the irregularity in the venue.

The objection to the entitling of the court is not tenable upon the ground stated. The affidavits were all made before the suit was commenced. Such affidavits should in no case be entitled in any court or cause. When they are so entitled it is a good cause for their rejection. Rex v. Jones, 1 Str. 704; Rex v. Pierson, Andr. 313; Rex v. Harrison, 6 T. R. 60; King v. Cole, 6 T. R. 640; 1 Dan. Ch. Pr. 891; Humphrey v. Cande, 2 Cow. 509; Haight v. Turner, 2 J. R. 370; Bronson v. Mitchill, 12 J. R. 460; Milliken v. Selye, 3 Denio, 54; Hawley v. Donnelly, 8 Paige, 415; 1 Barb. Ch. Pr. 609. See, also, the decision of this court made in the present term in The Blake Crusher Company v. Ward *et al.* But it was said at the argument, if there is no entitling how can it be known for what purpose the affidavit was made? This objection, if it be one, can be very easily obviated by stating the purpose for which it is intended in the affidavit itself.

The bill and affidavits having been read, defendants' counsel offered to read a sworn answer and accompanying affidavits in opposition to the motion. To this the complainant's counsel objected, on the ground that he had not been served with copies. Affidavits to be used in support of, or in opposition to, special motions, ought always to be served on the opposite counsel a reasonable time before the motion is brought on. Where this is not done the court may reject the affidavits, or, in its discretion, allow the same to be read, giving the opposite party the option to proceed with the hearing or to take time for the perusal and examination of the affidavits, and production of affidavits in reply where that is competent. The latter course was pursued in the present case. * * *

Effect of Express Company's Receipt limiting Liability where Value is not inserted.

The supreme court of Illinois has recently determined a point of interest to carriers and shippers, in the case of Oppenheimer v. United States Express Company, published in the Chicago Times of the 5th instant. The question presented was as to the validity of a clause in the express company's receipt, restricting their liability to $50, unless the value of the package was stated. The goods lost were claimed to be of the value of $3,800. But instead of inserting the value in the blank space left in the receipt for that purpose, the agent of the consignor had inserted a mark inexpressive of any value. It was held as a preliminary question that the consignors being merchants, and having dealt for several years with the company, using their printed books of receipts, in which the clause in question was inserted, must be presumed to have known of its existence. It was urged, however, that it was incumbent on the company to show, not only that the consignors had notice of the condition, but also that they *assented to it* and consented to be bound thereby. But the court thought otherwise. SHELDON, J., said:

"A distinction exists between the effect of those notices by a carrier, which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to ensure good faith and fair dealing on the part of his employer; in the former case, notice alone not being effectual without an assent to the attempted restriction, while in the latter case notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient. The rule in this case is thus laid down by the supreme court of New York: 'If he (the carrier) has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner (and courts and juries are liberal in inferring such knowledge from the publication of the notice), is as effectual in qualifying the acceptance of the goods as a special agreement, and the owner at his peril must disclose the value and pay the premium. The carrier in such case is not bound to make the enquiry, and if the owner omits to make known the value, and does not therefore pay the premium at the time of delivery, it is considered as dealing unfairly with the carrier, and he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice.' (Orange County Bank v. Brown, 9 Wend., 115. See, also, 2 Greenleaf Ev., p. 215; Ang. on Carriers, p. 245; Farmers' and Mechanics' Bank v. Champlain Trans. Co., 23 Vt. 186; Moses v. Boston and M. Railroad, 24 N. H. 85.) The distinction above adverted to has been recognized by this court. (Western Transfer Co. v. Newhall *et al.*, 24 Ill. 466.) The common carrier is liable, as we find it frequently laid down, in respect to his reward, and the compensation should be in proportion to the risk. As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for the services and risk, and the degree of care which he ought to bestow in discharging his trust. (Hollister v. Nowlen, 19 Wend. 244.) And such a limitation of the carrier's liability as the one in question is held to be reasonable and consistent with public policy.

"But independent of the qualifying provision contained in the receipt, we should be inclined to sustain the defendant's claim of exemption from liability on the ground of a want of good faith in not disclosing the value of the goods. These consignors knew that there was a recognized distinction on the part of the company between valuable packages and ordinary freight; that they had their separate collectors of the two kinds, and the consignors were provided with signs to hang out to denote which one of the collectors they had goods for. They must have displayed the sign indicating that they had ordinary merchandise to be carried, as the box in question was delivered to that collector. In the blank receipts which they were so frequently filling out, there was a blank space after a dollar mark for filling in the amount the goods were valued at; this was a virtual request on the part of the company to state the value. There was an actual attempt here by the agent of the shippers to fill in this blank space, but instead of inserting $3,800 (the value) a mark or character was inserted in-

expressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shippers of the goods. The effect of such conduct to relieve the carrier from his liability as insurer, is asserted in the cases of the Chicago and Aurora Railroad Company v. Thompson, 19 Ill. 578, and American Express Company v. Perkins, 42 Ill. 459. Had the true value of the goods been disclosed there would have been an extra charge of $8.50, but increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved. The court below was justified in coming to the conclusion that the consignors elected to take the risk of the loss, rather than subject the plaintiffs to the enhanced charges that would have been made, had the value of the package been disclosed.

"It is unnecessary to consider the effect of that provision in the receipt which has been urged upon our attention by appellant's counsel, that the company are not to be held liable for any loss or damage except as forwarders only; as that provision and the one in question are distinct and severable, and one might be held to be obligatory upon a party where the other would not be. We are urged on behalf of the appellants to put this construction upon the receipt: that the limitation of liability to $50 in case of loss relates only to the duty of the company while acting as carrier. We do not regard the instrument as reasonably susceptible of any such interpretation. The plain reading as well as meaning of the limitation in question is that the company are not to be held liable for any loss or damage of any package for over $50 unless its value be stated. And the limitation is not liable to the objection urged by appellant's counsel, that it is invalid because the effect of it would be to relieve the company from all liability even in loss occasioned by its own negligence. The established legal construction of such condition is otherwise. They are not to be read as providing against losses or injuries occasioned by actual negligence. (Story on Bailm. § 570, 571; Sager v. Ports. S. & P. & E. R. R. Co., 31 Maine, 228). Numerous are the decisions where the validity of such provisions has been recognized and affirmed."

Judgment was rendered below for the defendants, and this the supreme court affirmed.

Notes and Queries.

GLASGOW, KY., February 12th, 1874.

EDITORS CENTRAL LAW JOURNAL:—In your paper of the 5th inst., you publish the case of Townsend, Assignee, etc., v. Leonard, Sheriff, etc., in the United States circuit court, district of Kansas, November term, 1873, before Judge DILLON, in which it was decided that property in the hands of a sheriff, under execution of *fi. fa.* from the state courts, before proceedings in bankruptcy were commenced, cannot, at the instance of the assignee in bankruptcy, be taken out of the possession of the sheriff by the federal court; that such sheriff has the right to satisfy the execution in his hands, and will only be required to surrender the residue of property, or money, after this has been done.

In a case like that of Townsend, Assignee etc. v. Leonard, etc., when the sheriff, under *attachments* from state courts, has seized property before the proceedings in bankruptcy have been commenced, will he (that is, the sheriff) be compelled by the federal court to surrender the property to an after-appointed assignee? or, will the state court, having obtained jurisdiction of the case, be permitted to go on, and, through its ministerial officers, dispose of the *attached* property and apply the proceeds to the satisfaction of the debts of the attaching creditors?

Please answer under "Notes and Queries," and give authorities.

Respectfully, L. M.

ANSWER.—The federal court will not disturb the *possession* of the state court or its officer. One remedy of the assignee if he claims the property, is to apply to the state court and set up his rights and *there* litigate them; and possibly he may bring in the federal court actions to test his rights, which do not look to the *possession* of the property. See Marshall v. Knox, 16 Wall. 551; Wilson v. City Bank of St. Paul, 1 CENT. LAW JOUR. 40; also, cases cited in Townsend v. Leonard, 1 CENT. LAW JOUR. 69; Johnson v. Bishop, 1 Woolw. 324; Cragin v. Thompson, 2 Dillon C. C. 513.

KANSAS CITY, February 13, 1874.

EDITORS CENTRAL LAW JOURNAL:—On January 1, 1869, A. conveyed lot 1 to B. in trust for the benefit of C., to secure him in the payment of a promissory note. C., on July 1st, 1869, after the maturity of his note, for full value, assigned it to F., and shortly thereafter entered upon the margin of the record full satisfaction for the trust deed. On September 1, 1869, A., by deed of general warranty, conveyed said lot, for a valuable consideration, to H., who in every sense became a *bona fide* purchaser, and is now in possession of the lot. On January 1st, 1870, at the request of F., who was still the legal holder of the note, B. sold the lot under the trust deed and F. became the purchaser.

1. Had C., under Wagner's Statutes, p. 956, §. 14, legal capacity to enter satisfaction of the trust deed?

2. Can F. recover in ejectment?

3. Has F. in equity any ground for setting aside the entry of satisfaction as against H.? ——. ——.

ANSWER.—As a rule we must decline to answer questions depending upon local statutes, and which may be in actual litigation. We have not the benefit of arguments which are necessary to the formation of intelligent opinions. The questions put by our correspondent might depend upon whether it was the duty of F. to take and record an assignment of the mortgage or deed of trust, and this might be affected by the local registry laws. As to the general rules of law applicable to deeds of trust and sales and titles thereunder, see 2 Am. Law Reg. (N. S.) 641, 705; Ibid, 449.

As to the necessity of *registration* of assignments of mortgages, see the cases cited and stated by Mr. Hilliard in the fourth edition of his valuable work on mortgages, pp. 537, 579, 580, 581 and notes. As to release and discharge of mortgages, see Ib. ch. 17, pp. 473—529.

Book Notices.

A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES. By FRANCIS WHARTON, LL.D., author of "Conflict of Laws," etc. Seventh and Revised Edition. Phila.: *Kay & Bro.* 1874; 3 vols. §§ 3542. Sold by Soule, Thomas & Wentworth, St. Louis.

In 1846, James Kay & Brother published, in one comparatively small volume, the first edition of Wharton's American Criminal Law. The house of Kay & Brother have just published the seventh edition of the same work in three large and handsome volumes, revised by its learned author. To publisher and author alike, the proofs of the great and deserved popularity of the work cannot be other than exceedingly gratifying. More than three-and-twenty years ago we became practically familiar with the first edition, and have noted since then the gradual expansion and constant improvement of the work under the skilful and pains-taking care of its author. It is not probable that its structure will be hereafter changed; and when we consider that it has not been excogitated at once, but has been gradually *thought out* and constructed by its author during a period of over a quarter of a century, and that it embraces the entire domain of Criminal Jurisprudence, it may confidently be affirmed that it is destined to remain as one of the principal works upon the subject of which it treats.

The first volume of this edition is devoted to Principles, Pleading, and Evidence. The second volume treats of Specific Crimes, and the matter of the second and third volumes of prior editions is here compressed into one. This makes room for a third volume, which is substantially new, and is appropriated to Criminal Practice. Upon each of these departments the work constitutes a complete treatise. While Mr. Wharton's work does not supersede other useful treatises, English and American, upon Criminal Law and Procedure, yet it is at the same time true that there is no complete substitute for it.

It is useless to refer at length to a work so well known and in such universal use. We must content ourselves with a brief glance at what is peculiar to the present edition. The new arrangement of the work we have already indicated. In every part of this edition the careful presence of the author is observable. While the work retains its former character of *practical usefulness*, this edition is distinguished by its copious reference to the criminal jurisprudence of other countries, ancient and modern, and in this important respect the work has been so enriched by the researches and learning of the author, that it will hereafter rank as one of the legal classics in American law, and will be consulted, not only by the busy lawyer and judge in the press of trials, but by the philosophical student, who aspires beyond mere precedent, and wishes to attain those enlarged views which can come only from comparative jurisprudence, or an examination of those systems and principles of law which have prevailed among enlightened nations in successive periods of the world's history.

Recent Reports.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPERIOR COURT OF INDIANAPOLIS. By O. M. WILSON, official reporter. Judges: Hon. SOLOMON BLAIR, Hon. HORATIO C. NEWCOMB, Hon. FREDERICK RAND. Single copy, quarterly, $1; Vol. 1, four parts, with fifth part, making index, etc., $4.

The superior court of Indianapolis is organized on a plan similar to the supreme court of New York. The judges sit separately at *nisi prius*, or at "Special Term," and then meet in "General Term," and review causes appealed from "Special Term." These Reports, therefore, possess a value similar to Barbour's New York Reports. They will be of some value to the practitioner in Indiana; and outside of that state we suppose the cases contained in them will stand on their intrinsic merits, and will not possess less persuasive force because they are not decisions of the court of last resort. The reporter has annotated each case with a diligence which is commendable, and for which we fear he will never be adequately paid.

We notice the following cases as possessing general interest:

Assault and Battery—Aiding and Abetting.—Liability for *assault*, extends not only to persons committing the act, but as well to those who are present and encourage either its commission, or its continuance. Baldwin v. Biersdorfer, 1.

———. ———. Presence at the commission of an offence, and encouragement, either by words, signs, or gestures, or being sufficiently near, in pursuance of an agreement to assist, is *aiding and abetting* in the commission of the wrongful act. Ibid.

———. ———. *Conspiracy.*—Where the evidence discloses the presence of others in a situation to render aid, the jury may determine whether such persons were not there for the purpose connected with the assault, and from such circumstances and facts they may properly infer the formation of a *conspiracy* for its commission. Ibid.

Assignment of Debt—Collateral Security.—An assignment of a debt carries with it all collaterals given to secure its payment. Kemp v. Dickson, 42.

———. ———. An assignment of a note, "without recourse," will not release the collateral given to secure the payment of the note, unless so stipulated at the time of assignment, and without such agreement, the security passes with the note. Ibid.

———. ———. A person holding collaterals to secure the paymen of a debt, holds them simply as a special trustee. Ibid.

———. ———. *Admission of Agent.*—Where a statement is made by the assignor to the agent of the assignee, pending the negotiation for the note, that he held a certificate as collateral for the security of the payment of the note—held, that such an admission is competent evidence to show notice to the assignee of such security, when he purchased the note. Ibid.

Contracts—Presumption—Parol.—Where the complaint does not aver that a contract is in writing, the presumption is that it was by parol. Smith v. Indianapolis, Peru & Chicago Railway Co., 88.

False Imprisonment—Arrest of Insane Person.—If there is probable cause to believe that a person is insane, and is about to commit any mischief, which, if committed by a sane person, would constitute a criminal offence, an officer may detain the offender until it may reasonably be presumed that he has changed his purpose. Pætz v. Dain, 150.

———. Parties acting at the instance of any one assuming the duties of a ministerial office, are bound to know whether he is in fact such officer, and whether he in fact bears that authority. Thus, persons who, in obedience to the orders of one who claimed to be a "special constable," had imprisoned the plaintiff, were held liable in damages for a false imprisonment, it not appearing that the constable's appointment had been recorded on the justice's docket, as required by the statute. Schaw v. Dietricks, 153.

Innkeeper—Liability of, for Property Stolen from Guests.—The "rules" of a hotel requiring "money, jewelry, and other valuables" to be deposited in the safe of the office, do not apply to a watch which a guest has on his person, and keeps for his personal use, and which is essential to his personal comfort and convenience. Milford v. Wesley, 119.

———. ———. Where a guest is told by the innkeeper, or his servant, "not to lock the door; for other parties had to come into the room, to go to bed, and the door should be left unlocked for them;" or, "that he could either lock the door, and get up and let them in when they come"—*held*, that a lack of ordinary care can not be imputed to a guest, acting in obedience to such instruction—in leaving the door unlocked—and the innkeeper will be responsible for property stolen from such guest.

Mechanics' Lien—Conversion.—A mechanic may waive his lien by delivering the goods before payment, or accepting security for their price. His refusal to deliver on demand in the latter case, will not work a conversion of the goods manufactured, if such refusal was, by reason of his ignorance as to whether or not the debt was secured; nor can the person in such case making the demand, recover the price of the goods because of such refusal. Farman v. Ratcliff, 145.

———. ———. On a demand for goods, the payment of which has been secured at a distant day, the manufacturer, when he is not in a condition to know, will be entitled to a reasonable time to ascertain the character of such security, before delivering the goods. Ibid.

Municipal Corporation—Common Council.—The common council, so far as their administrative or ministerial duties extend, are agents of the city, and as such may contract, among other things, for street improvements. Sylvester v. Macauley, 19.

———. *Jurisdiction of.*—The jurisdiction of a common council is confined to that territory only which is within the boundaries of the city. Ibid.

———. ———. *Improvements beyond City Limits.*—The city council has no power to contract for improvements beyond the city limits, and no assessment will lie, therefore, against property-holders abutting such improvements. Ibid.

———. ———. ———. A person contracting for a street improvement has a right to presume that the council had used the proper diligence to acquaint themselves with the city boundaries. Ibid.

———. *Liability of Members of Common Council for Exceeding their Authority.*—Public agents exceeding, negligently using, or abusing their authority, are liable to the injured party, and members of the common council, as such, in carelessly authorizing improvements beyond their jurisdiction, become personally liable for the value of the work done in obedience to their authority and direction. It is not sufficient to show that they acted *bona fide* and in ignorance of the true city boundary. They are bound to the exercise of reasonable skill and diligence in acquainting themselves with the territorial limits of the city, and are supposed to know the limit of their power. Ibid.

———. *Liability of Mayor.*—But an affirmative participation in such unauthorized action of the council is necessary to attach responsibilityf or its acts. And therefore, the mayor of a city, under the laws of this state, who is *ex officio* president of the common council, and as such is required by law to attend their proceedings, and in case of an equal division, gives the casting vote, but in no other sense is he a part of the council; is not liable for the consequences of proceedings of the council in excess of its jurisdiction, simply because he signed the ordinance. Ibid.

———. *Improvement of Streets.*—The members of the common council of a city, in acting upon a petition for the improvement of a street, have a right to assume that the petition is made in good faith by the owners of real estate, who are willing to pay their share of the burden, and who desire the improvement, and that all the petitioners are uninfluenced by any combination by which a few, who are anxious for the improvement to be made, have agreed to pay a consideration, either directly or indirectly, to procure the signature of others to the petition. Maguire v. Smock, 92.

———. ———. *Good Faith.*—Good faith toward the owners of real estate, who are in the minority, and who are opposed to the improvement, and to having the burden imposed upon themselves, requires that the petitioners should all be willing to assume their due portion of the tax, and that they should not be paid a consideration for signing the petition. Ibid.

———. ———. An agreement by which a sum of money is guaranteed to be paid to certain persons, provided they will petition the common council of a city for the improvement of a street, is void, as against public policy, and cannot be enforced. Ibid.

———. ———. *Pleading.*—Where specific facts are set out in an answer, from which a legal inference arises that the agreement sued on is

corrupt and void, as against public policy, it is not error to sustain a demurrer to a reply stating, in general terms, that the contract sued on was accepted, and the acts of the plaintiff in compliance with the agreement were done in good faith, without any desire or design to exercise a corrupt or fraudulent influence. Ibid.

———. *Liability for Injuries Caused by Defects in Sidewalks.*—All persons, in using the streets and sidewalks, have the right to assume that they are in a good and safe condition, and to regulate their conduct upon that assumption. Kenyon v. Indianapolis, 129.

———. ———. If a city permits the construction of a vault under a sidewalk, she must use due care and diligence to see that the vault is properly constructed, and the opening thereto securely and safely covered; and if constructed in a sidewalk, over which the city has exclusive control, the court will infer, in the absence of any allegations to the contrary, that it was constructed under a license from the city authorities. Ibid.

———. ———. *Negligence.*—Proof of the mere existence of a latent defect in a sidewalk in a city is not enough to charge the corporation with negligence; the corporation must in some way be in fault in connection with the defect; and if the defect does not originate in the construction, express notice of the defect, or negligence of duty in not ascertaining and remedying it, must be shown, else the city will not be liable to repair. Hence, it is not enough to entitle the plaintiff to recover, to prove that the covering was insecurely fastened at the time of the accident, and that, by reason thereof, and without fault on her part, she was injured. Ibid.

———. ———. ———. A liability only attaches to a municipal corporation where there has been a failure to remedy such defects as may be detected and removed by the exercise of ordinary care and diligence. Mere knowledge on the part of a few private citizens of a latent defect in a sidewalk, is not sufficient to charge the city with notice. Ibid.

Promissory Note—Release of Surety.—Defendant answered that plaintiff, without his knowledge, extended the time of payment for a consideration, and by so doing released him from further liability as surety. The plaintiff, in reply, declared: (1.) That no consideration was given for the extension; (2.) That defendant had received security from A. to indemnify him against loss on this note, and that he still held such security; (3.) That defendant, after extension of payment, consented to, ratified, approved, and confirmed such extension.

Held, on demurrer to these several issues—

(1.) That if the agreement to extend the time for payment was made without any valid consideration, it did not release the surety; (2.) That where the surety is fully secured by property in his hands, he is estopped from objecting to any extension of time made between creditor and principal; such security being, in effect, an appropriation by the surety of that portion of the effects of the principal to the payment of the debt. Bohring v. Root, 29.

———. *Same Persons Joint Obligors and Obligees.*—The firm of J. B. Randall & Co., which was composed of Randall, *Lawyer* and *Hall*, made their note to the order of the firm of *Lawyer & Hall;* said firm endorsed it to the First National Bank of Shelbyville, which bank was at the time aware of the relations the makers and endorsers have to each other. Said bank afterward sued Lawyer & Hall *as endorsers*, and recovered a judgment against them as such. Afterward, for a valuable consideration, said bank assigned said note to plaintiff, who instituted this suit against Randall, Lawyer and Hall, as makers. *Held*, That Lawyer & Hall could not maintain a suit at law on the note against Randall as maker, because the same persons cannot occupy the positions of both obligor and obligee: but they can endorse it to a third party, who can maintain such action against all the makers. [See 11 Metc. (Mass.) 398; 17 Pickering, 361; 18 Ohio, 305; 5 Cowen, 688.] Merchants' National Bank v. Randall, 166.

———. ———. *Merger.*—The doctrine of *merger* does not apply to such a case; the judgment in favor of the bank against Lawyer & Hall *as endorsees* did not merge the note so that suit cannot be maintained against Randall *as maker.*

Railways—Negligence.—Where a person approaches a line of railroad that for some distance is to be seen from, and in direction of, a highway which he is traveling, and the railroad crosses, and such person fails to use all reasonable means to ascertain whether a train is near, or that it would be safe to cross the track without stopping to look and investigate the probabilities of danger, and goes upon the track, and is injured by a passing train, he is guilty of negligence, and cannot recover damages. Stout v. Indianapolis & Saint Louis R. R. Co., 80.

———. *Contracts of.*—Where parties living adjacent to a railroad track made the grade, and furnished the cross-ties for a switch for neighborhood convenience, under a contract with the railroad company that the switch should remain permanently, etc., *held:* That after the road and franchises of the contracting company had been sold under a decree of foreclosure, the corporation purchasing the same might remove the switch, unless it assumed the original contract under sec. 3 of the railroad act of March 3, 1865. Smith v. Indianapolis, Peru & Chicago Railway Co., 88.

Taxation—Municipal Purposes.—A special school tax levied pursuant to section 12 of the school law of March 6, 1865, does not exempt bank stock by virtue of section 9 of the bank tax act, approved March 15, 1867, which provides that "Nothing in this or any other act shall be so construed as to authorize the taxation of stock in the Bank of the State of Indiana, or in any national bank, for municipal purposes." The term "municipal purposes," as used in that act, has no application to township taxes, nor to special school taxes levied by trustees of townships, or by school trustees of incorporated cities, as special school taxes, under the authority conferred by section 12, *supra*, of the act of 1865. Such taxes are levied pursuant to the general law of the state, and for purposes connected with the general internal administration of the state, or to carry out the general common school system, and do not come within the definition of municipal taxes. Root v. Erdelmeyer, 99.

Trade Mark.—A party purchasing part of a trade mark, and adopting the rest, will be protected in his title to the former as well as the latter. Sohl v. Geisendorf, 60.

———. The use of some word, letter or character of a trade mark, by different parties, without hindrance, will not work an abandonment by him in whom its right of use and title is vested. Ibid.

———. A trade mark composed of such devices as denote simply quality of an article, will be protected, especially if it is once established. Ibid.

———. It is an infringement of a trade mark, even though the imitation and original, when placed side by side, would not mislead, if the similarity is such that a difference would not be noticed when seen at different times or places. Ibid.

Trespass upon Realty—Adverse Possession.—Where no adverse possession is shown, a plaintiff in an action for trespass upon realty, may recover without showing previous possession. Carter v. Augusta Gravel Road Company, 14.

———. ———. *Complaint.*—A complaint in trespass, simply declaring for damages by adverse possession, and for removal of buildings, does not raise the question of title to the real estate. Ibid.

———. ———. *Justification—Pleading.*—Where the defendant in an action of trespass justifies by reason of some title or easement, which gives him a legal right to do the act which is the subject of the action, he must set forth the title or right to enjoy the easement specially. Ibid.

Adverse Entry—Presumption.—An adverse entry is not to be presumed, but must be proven. Ibid.

Witnesses—Competency—Husband and Wife.—A husband who acted as an agent for his wife, in the transaction of her business, is not a competent witness in a suit brought by the wife, to prove the transactions of such agency. Kemp v. Dickson, 42.

Legal News and Notes.

—THE house judiciary committee, through Mr. Butler, has reported adversely on the memorial asking for an acknowledgment of Almighty God and the christian religion in the constitution of the United States.

—THE Washington Chronicle contains a long "opinion" of Hon. Caleb Cushing, dated December 16, 1872, upon the obligations of the United States in the matter of public improvements in the City of Washington. Now let us get some western lawyer to write an opinion upon the obligation of the government to improve the navigation of the Mississippi river and its tributaries.